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Frank C. Haymond
West Virginia Bar Association

JOHN MARSHALL — HIS INFLUENCE ON THE CONSTITUTION AND THE COURTS*

FRANK C. HAYMOND**

On July 4, 1835, in a boarding house on Walnut Street in Philadelphia, the city in which American independence was proclaimed fifty-nine years before, and in which was framed the American Constitution, which he labored so long and so faithfully to preserve and defend, within the sound of the great bell in the tower of Independence Hall, which since his passing has been heard no more, John Marshall lay sick, awaiting the final summons which he well knew must soon arrive. Through this same city he had marched, as a patriot soldier in the army of Washington, nearly sixty years before, on his way from Valley Forge to participate in the glorious victory of Monmouth. What place more fitting or surroundings more appropriate in which to end life's journey and his entrance make to that undiscovered country from whose bourn no traveller returns. Though in his eightieth year, his mind was as clear and as strong as ever. If we but give play to our imaginations we might easily guess the compass of his thoughts. Most likely in his memory again appeared the many and varied events of his long and useful life. Well might he have recalled his boyhood days as a child of the Virginia frontier, engaged in performing the tasks assigned him about his father's home; his trials and hardships as a soldier of the Revolution, where under his personal hero, Washington, he saw the defects and the weaknesses of the Confederation and developed the firm conviction, which remained with him throughout his life, of the necessity of a strong and enduring central government possessed of the power to function and endowed with the essential attributes of self preservation; his return to civil life; his removal to Richmond, where he married; his admission to the bar of that city, and his entrance into the political life of the Old Dominion; his work in the Convention of his state, which met in 1788 to consider, debate and ratify finally the Constitution of his country; his earlier services to the nation as a member of Congress, as special envoy to France, and as Secretary of State, under John Adams;

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** President of the West Virginia Bar Association 1934-35; member of the Bar of Fairmont, West Virginia.

his appointment in the last days of the Adams administration to the crowning position of Chief Justice of the Supreme Court of the United States; the tremendous tasks and burdens which constantly fell upon his willing and capable shoulders; the admiration of his friends and associates; and the storm of bitter and relentless criticism which raged around and about him from the time of his first great constitutional decision in the case of *Marbury v. Madison,*[1] in 1803, until the dark day, in 1832, when his decree in the case of *Worcester v. Georgia*[2] was ignored and disobeyed by the Governor and the authorities of that proud state. Calm and serene, through such memories, with the realization of constant devotion to duty, of fairness and honesty in all his dealings, and of long service to his state and nation, unsparingly given to the limit of his ability to serve, as the sun sank in the west, he died, at six o'clock in the evening, of Monday, July 6, 1835. Well might he have exclaimed, with the Great Apostle to the Gentiles, "I have fought a good fight; I have finished my course; I have kept the faith".

The morning after his death the bar of Philadelphia met to pay tribute to his memory and in the evening of the same day a public meeting was held in his honor. His body was carried by boat to Richmond. The bench and bar of Philadelphia and hundreds of its citizens followed him to the ship, and a committee of distinguished men accompanied him to Richmond, where, on July 9, 1835, he was buried beside his wife, in beautiful Shochoe Cemetery. Throughout Virginia and the nation for many days public tributes were offered to his memory. He lies beneath a modest monument in front of which in May of this year impressive memorial services commemorating the centennial of his death were held by Virginia bar associations. As the representative of the West Virginia Bar Association it was my privilege to be present at these exercises which were attended by the President of the American Bar Association and by lawyers from many parts of the country.

One other incident connected with the death of Marshall is of peculiar interest to West Virginians. A little more than one hundred years ago, — on July 22, 1835, — the Supreme Court of Appeals of Virginia, then in session at Lewisburg, the county seat of Greenbrier County, then Virginia, now West Virginia, in

[1] 1 Cranch (U. S.) 137, 2 L. Ed. 60 (1803).
[2] 6 Pet. (U. S.) 515, 8 L. Ed. 483 (1832).

solemn memorial ceremonies paid its tribute to the life and the labors of the great Chief Justice, and among the prized possessions of the Clerk of the Supreme Court of Appeals of this state, in his office in Charleston, is the original record of this interesting and impressive proceeding.

Thus having sketched in retrospect the outlines of the life of Marshall, which is all the limits of my time permit, I turn to a brief consideration of his contributions to the constitutional law of our country and his influence upon the Supreme Court and our entire judicial system.

When Marshall became Chief Justice, on January 31, 1801, the nation was passing through its first great political crisis. The Federalist party which had been in control of the legislative and the executive branches of the government during the first twelve years of our history was about to relinquish that control to the party of Jefferson which advocated the doctrine of the rights of the states and opposed the Federalist view of the supremacy of the national government. The conditions which existed were not unlike those with which we have been recently confronted. Unrest, dissatisfaction and uncertainty were present in many sections of the country. The position of the Supreme Court in the constitutional structure had not been established. Indeed, it had not been considered in any practical sense by those in authority, and was little, if at all, understood or appreciated by the people of the nation. Only one important constitutional question had been before the court in the case of *Chisholm v. Georgia,*[3] in 1793, in which opinions were written by all the members of the Court, and in which it was held that a citizen of another state could sue a sovereign state of the union. And this decision, though clearly right, met with such general disapproval and created such a storm of protest, that it resulted, in 1798, in the adoption of the Eleventh Amendment to the Constitution, which prohibits any suit against a state by a citizen of another state or by citizens or subjects of a foreign state.

So relatively unimportant, as a part of the government, was the court regarded, as compared to the Congress and the President, that in 1800, when the seat of the government was moved to Washington, though buildings had been provided for them which were then criticized as extravagant, no provision whatsoever had been made to house the Judiciary. No arrangement

[3] 2 Dall. (U. S.) 419, 1 L. Ed. 440 (1793).

was made until two weeks before the beginning of the first term of the Court held in the new capital, and then the room ultimately assigned to the Court was an undignified chamber only twenty-four feet wide and thirty feet long which had been set apart as the office of the Clerk of the Senate. Before the date of this term of the Court in Washington, Chief Justice Ellsworth, who was then in France, resigned, and President Adams at once appointed as his successor the former Chief Justice, John Jay. Though confirmed by the Senate, Jay declined the appointment, which the newspapers of the period termed a sinecure in remarking that the first Chief Justice, Jay, had discharged its duties while residing in England, and that the second, Ellsworth, had done the like while spending his time in France. Thus as his second choice, almost as a last resort, Adams, to the surprise of his associates who desired that the appointment be given to William Paterson, a member of the Court, or to William Pinkney, the then acknowledged leader of the bar, sent to the Senate, on January 20, 1801, the nomination of Marshall for the office of Chief Justice of the United States. At the time he entered upon the discharge of his duties, he was forty-five years of age, and although he was without prior judicial experience, as a lawyer he ranked among the leaders of the bar of Virginia, a bar which included the outstanding James Innes and the oratorical Edmund Randolph.

From its position of relative unimportance and insignificance in our form of government, which, as you have seen, was generally believed to be the lot of the Supreme Court at the turn of the nineteenth century, Marshall, during his thirty-four years as its Chief Justice, brought it to the commanding place which it now occupies, which, since his time it has occupied, and which the framers of the Constitution intended that it should occupy in the government created by that Constitution. This he did, almost single handed, often against the most persistent and determined opposition. His genius and breadth of judicial vision overshadowed his associates on the court and he dominated the court by the sheer power of his reasoning, his knowledge of government, his statesmanship, his remarkable gift of clear and lucid statement, and the force of his own personality and character. The measure of his control is established by the records of the Court. During the period 1801 to 1835, of the sixty-two decisions involving constitutional questions he wrote the opinions in thirty-six, in twenty-three of which there was no dissent, and of the total

of one thousand one hundred and twenty-one cases in which opinions were filed, he delivered five hundred and nineteen. In only nine cases did he file a dissent.

Step by step he expounded the Constitution, interpreted the meaning of its provisions, stated its fundamental principles, enumerated and explained in clear and precise terms its purpose and objects, declared the powers of each of the three branches of the Federal government, and of the states, determined the relation of each to the other, and defined and limited the scope of the exercise of each. In this process he gave to these pronouncements judicial sanction, and established finally and permanently in our constitutional system the independence and the supremacy, within the limitations of the Constitution itself, of the judicial department of our government. All this, and more, he accomplished by the judgments of the Court in a series of cases involving grave constitutional questions upon the proper solution of which depended the very existence of our constitutional form of government. These cases, beginning with *Marbury v. Madison,*[4] in 1803, and ending with *Barron v. Baltimore,*[5] in 1833, are known to every lawyer and student of Constitutional Law, but a brief reference to and consideration of the fundamental principles which they enunciate seems to me appropriate in this discussion. Accordingly I proceed to an analysis of a few of these decisions.

Scarcely had Marshall become a member of the court when it was faced with the duty of determining whether a certain citizen of the United States, one William Marbury, could enforce, by mandamus in an original proceeding in that court, his claim to an office to which he had theretofore been appointed, against an executive officer of the government, none other than James Madison, its Secretary of State, and whether the Supreme Court, under the Constitution, had the power to grant Marbury that relief. Marbury had been appointed a Justice of the Peace by President Adams who had signed his commission and delivered it to his Secretary of State whose term of office expired before its delivery to Marbury. Madison refused to deliver the commission to Marbury, and he applied to the Supreme Court for a writ of mandamus to compel its delivery. An act of Congress authorized the Supreme Court to issue writs of mandamus to public officers. The Constitution provides that the Supreme Court shall have original juris-

[4] *Supra* n. 1.
[5] 7 Pet. (U. S.) 243, 8 L. Ed. 672 (1833).

diction in all cases affecting ambassadors, other public ministers and consuls and those in which a state shall be a party, and that in all other cases it shall have appellate jurisdiction. Thus the validity of the act, under the Constitution, came squarely before the Court. In an opinion written by Marshall, in which only one citation of judicial authority appears, a decision of Lord Mansfield concerning instances in which the writ of mandamus should issue, the court decided the important and far reaching questions involved.

Marshall first determined that Marbury had a right to the office he sought and a remedy against his exclusion from it; and in arriving at this conclusion, he declared that the very essence of civil liberty consists in the right of every individual to claim the protection of the laws whenever he receives an injury, and that one of the first duties of government is to afford that protection; that the government of the United States is a government of laws, not of men, and that the heads of departments are amenable to those laws; that the province of the court is solely to decide on the rights of individuals, and not to inquire how the executive performs duties in which he has a discretion; and that questions in their nature political, or which are by the Constitution and the laws, submitted to the executive, can never be determined by the Court.

He then proceeded to settle the questions of the supremacy of the Constitution over a law in conflict with it, and of the power of the court to pass upon the validity of an act of Congress, and approached and decided these points by asserting that the question whether an act repugnant to the Constitution can become a law of the land, is one of deep interest to the United States but not of an intricacy proportioned to its interest; that it is only necessary to recognize certain principles, supposed to have been long established, to decide it; that those principles are deemed to be fundamental and, as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent; that this original and supreme will organizes the government and assigns to different departments their respective powers; that it may either stop at that point or establish certain limits not to be transcended by those departments; that the government of the United States is of this character; that the powers of the legislature are defined and limited; that the limits imposed may not be mistaken or forgotten the Constitution is written; that it is a

proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it, or that the legislature may alter the Constitution by an ordinary act; that between these alternatives there is no middle ground, the Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it; that if the former part of the alternative be true, then a legislative act contrary to the Constitution is not law, if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable; that those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the Constitution, is void; that it is emphatically the province and the duty of the judicial department to say what the law is and if two laws conflict with each other the courts must decide on the operation of each; that if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case so that the court must either decide that case conformably to the law disregarding the Constitution, or conformably to the Constitution disregarding the law, the court must determine which of those conflicting rules governs the case; that this is of the very essence of judicial duty; that the framers of the Constitution contemplated that instrument as a rule for the government of the courts as well as of the legislature; and that the peculiar phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void and that courts, as well as other departments, are bound by that instrument.

Thus the supremacy of the Constitution was proclaimed and the power of the Court to sustain that supremacy and to restrain Congress within the limits set by the Constitution was established. This principle is wholly and exclusively American, and is America's contribution to the field of constitutional law. I have referred somewhat in detail to the reasoning upon which this decision is based because its importance can hardly be realized and never over-estimated. In reality it determined both the nature of the Constitution and of the Union; it confirmed the doctrine of the limitation of the powers of the Federal Government and the

peculiar function of the Supreme Court to maintain the limitations fixed by the Constitution, and it located, in our scheme of government, the power to declare void a law in conflict with the Constitution. Though it denied to the Federal Government the right to extend its powers at will, it nevertheless assumed for it the right, through one of its branches, the judiciary, to determine the extent of the powers conferred upon it by the Constitution.

This decision shows, moreover, that it was not Marshall's wish or intention to claim for the court unwarranted power or to exalt it above the other departments of the government. He clearly states the true function of the court which is to decide cases properly brought before it. It can not, by the fullness of its power, or on its own initiative, pass upon an act of Congress and declare such act unconstitutional. Rather must it wait until an individual case is presented for its determination. Then, and only then, can it act, and its sole duty is to uphold the Constitution regardless of the character of the measure which violates or conflicts with that fundamental and supreme will of the people.

This great decision has been criticized by students of constitutional law because the court, after declaring the act of Congress conferring original jurisdiction upon the Supreme Court to issue writs of mandamus to public officers unconstitutional, dismissed the case for lack of jurisdiction and thus made dicta its pronouncements concerning the right of the petitioner to the relief which he sought; but regardless of this criticism its influence upon our constitutional system has been marked, and, because of the principles proclaimed and enunciated, its place is secure among the constitutional decisions of all time.

The storm of protest which followed this decision, though perhaps more bitter than that created by the far-reaching judgment of the Court in the recently decided case of *A. L. A. Schechter v. United States*,[6] involving the constitutionality of the National Recovery Act, was, as that prompted by the latter decision, largely political in its nature. In both instances the complaint has come from those who sincerely believed that the action of the court unwisely prevented or interfered with or rendered inoperative cherished policies or measures which in their judgment were designed to promote the welfare of the nation and to improve the condition of the people of the United States.

[6] 55 S. Ct. 837, 79 L. Ed. 888 (decided May 27, 1935).

The bitter resentment of Jefferson towards Marshall and the court provoked by the decision in *Marbury v. Madison,* was due to his belief that Marshall had gone out of his way to cast reflection upon the conduct of the affairs of the executive branch of the government; for though this was the first judicial determination by the Supreme Court of its power to declare an act of Congress unconstitutional, many leading statesmen of that day, in both political parties, and many members of the constitutional convention, held the opinion that that power belonged in the judiciary. The rugged declaration of Marshall in *Marbury v. Madison* that the province of the court is not to inquire how the executive performs a duty of a political nature in which he has a discretion, is matched in our own day by the firm statement of Hughes in the *Schechter* case,[7] that it is not the province of the court to consider the economic advantages or disadvantages of a particular plan or system. Then, as now, the court performed its duty under the Constitution, the duty of determining, regardless of the merits or the popularity of the measure, whether or not it violated or was repugnant to the provisions of the supreme law. The willingness of the court to perform that function and to decide the cause, is and has been since the days of Marshall, both its crowning glory and its claim to the confidence and the support of the people of the nation.

After *Marbury v. Madison* the question of the extent of the judicial power came before the court in the cases of *Martin v. Hunter's Lessee,*[8] in 1813, *McCulloch v. Maryland,*[9] in 1819, and *Cohens v. Virginia,*[10] in 1821. These cases dealt with bitter differences of opinion with respect not only to the legal but also to the political questions involved. In perhaps the greatest of the three, *McCulloch v. Maryland,* the argument in which consumed nine days and was participated in by Webster, Wirt and Pinkney, for McCulloch, the cashier of the Baltimore branch of the Bank of the United States, and by Walter Jones, Luther Martin and Joseph Hopkinson, for the State of Maryland, the constitutionality of the bank and the right of the State of Maryland to recover certain penalties imposed by an act of its legislature against such branch because of its failure to comply with the provisions of such act, were presented for the decision of the court. The

[7] *Supra* n. 6.
[8] 1 Wheat. (U. S.) 304, 4 L. Ed. 97 (1816).
[9] 4 Wheat. (U. S.) 316, 4 L. Ed. 579 (1819).
[10] 6 Wheat. (U. S.) 264, 5 L. Ed. 257 (1821).

issues in the case are stated at the beginning of the opinion by Marshall himself in these solemn and lofty words:

> "In the case now to be determined, the defendant, a sovereign State, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty."[11]

In an opinion rarely equalled and perhaps never surpassed, and in which not a single citation of judicial authority is used, he discussed these questions, sustained the constitutionality of the act of Congress establishing the Bank of the United States, and held the Maryland statute imposing a tax upon the bank as an instrument employed by the federal government in the execution of its powers, unconstitutional and void. In considering these questions he declared that it is a Constitution that he is expounding, a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs; announced that in America the powers of sovereignty are divided between the government of the union and the governments of the states, that each is sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other; and finally proclaimed the doctrine of implied powers, in carrying into execution the powers expressly conferred, so far reaching in the constitutional history of our country, in these well known words:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited,

[11] *Supra* n. 9, at 400.

but consist with the letter and spirit of the constitution, are constitutional."[12]

In *Cohens v. Virginia,*[13] in upholding the supremacy of the decisions of the Supreme Court of the United States over the judgments of the courts of the states, speaking of the Constitution, he used words to which dissatisfied and unthinking people today may well give heed. He said:

> "The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it."[14]

In 1819 the famous case of *Dartmouth College v. Woodward,*[15] which involved the constitutionality of an act of the Legislature of New Hampshire substantially changing the provisions of a charter granted in the name of George III to one Eleazer Wheelock, under which Dartmouth College was established and certain perpetual privileges were conferred upon its Trustees, was decided by the Court. In one of his best known opinions Marshall denied the power of a state under the Constitution to pass a law impairing the obligation of contracts and held the act of the legislature undertaking, without the consent of the Trustees, so to do, unconstitutional and void. Thus the sanctity of contracts to which even a state was a party, as well as between individuals, was rendered immune from the hostile action of a state. Though the broad scope of this decision has been modified and narrowed by the holdings of later cases, it yet remains and will continue to be of interest and importance in the field of American constitutional law.

The next great case involving constitutional questions to come before the Court was that of *Gibbons v. Ogden,*[16] better known as the Steamboat Monopoly Case, decided in 1824, the opinion in which was delivered by the Chief Justice. The validity of a statute of the state of New York granting to Livingston and Fulton the exclusive navigation of all the waters within the jurisdiction

[12] *Supra* n. 9, at 421.
[13] *Supra* n. 10.
[14] *Supra* n. 10, at 389.
[15] 4 Wheat. (U. S.) 518, 4 L. Ed. 629 (1819).
[16] 9 Wheat. (U. S.) 1, 6 L. Ed. 23 (1824).

of that state with boats moved by fire or steam, for a term of years, was challenged by Thomas Gibbons, who held a license granted under an Act of Congress and who claimed the right, by virtue of such license, to navigate those waters between Elizabethtown, New Jersey, and New York City. Many issues arose in the case. Did the New York statute, granting an exclusive right, conflict with the grants issued by the United States? Was the statute a regulation of commerce? If it was, did the state possess the concurrent right to regulate commerce in the manner contemplated by the statute? Did Congress possess exclusive power to regulate that commerce? Did the New York statute conflict with any act of Congress? In what many believe to be his greatest opinion, Marshall, with prophetic and statesmanlike vision, held the act of the legislature of New York repugnant to the commerce clause of the Constitution and therefore null and void, that commerce was not merely traffic, but was commercial intercourse of all kinds, that it included navigation, that commerce among the states did not stop at the boundary line of each state but may be introduced into the interior, that the power vested in Congress was complete and exclusive and that its exercise must extend within the territorial jurisdiction of the states and include every case of commercial intercourse which is not a part of the purely internal commerce of a single state. These principles have been applied and enlarged in a long list of cases from that day to this, all of which rest upon the fundamental ideas expressed by Marshall in this epoch-making decision.

Four years later, in 1828, the Court, in an opinion delivered by Marshall, rendered a decision of vast importance in connection with the territorial expansion of the nation. In the case of *American Insurance Company v. Canter,*[17] the validity and the effect of the treaty providing for the purchase of Florida were challenged. Marshall judicially determined the question by holding that the Constitution of the United States confers absolutely on the government of the union the powers of making war and of making treaties, and that consequently that government possesses the power of acquiring territory either by conquest or by treaty. This holding effectually set at rest all question of the constitutional authority of Jefferson to conclude the Louisiana purchase in 1804, an act which until this decision of the court had been by many, including Jefferson himself, believed to be beyond the con-

[17] 1 Pet. (U. S.) 511, 7 L. Ed. 242 (1828).

stitutional power of the government to perform. In pursuance of the doctrine of this case, our power as a nation has reached far beyond our shores and our government has come to embrace considerable insular territory. In fact, this case has given judicial sanction to our policy of national expansion and made it possible for the United States to take its place among the great nations of the world.

During the serious conflict between the Court and the State of Georgia, which originated in the execution of Corn Tassel, a Cherokee Indian, in defiance of a writ of error issued by the Court, in 1828, the case of *Worcester v. Georgia*[18] came before the court, at its January Term, in 1832. A criminal statute of the State of Georgia required all white persons living within the Cherokee country, after a specified date, to obtain a license and to take an oath of allegiance to the state. Worcester, a citizen of the State of Vermont, refused to comply with the statute, was arrested, tried and convicted in the Georgia State Court and sentenced to imprisonment at hard labor. A writ of error to this judgment was issued by the Supreme Court of the United States to the trial Court. The writ was ignored by the authorities of the state and no appearance thereto was made by it in the Supreme Court. The validity of the Georgia statute was challenged as being repugnant to the Constitution, treaties and laws of the United States by which the relations between the Cherokee Nation and the United States were exclusively regulated.

The issues are stated by Marshall in his opinion in this language:

> "The legislative power of a state, the controlling power of the constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered."[19]

On March 3, 1832, Marshall rendered the opinion of the Court holding the Georgia statute unconstitutional on the ground that the jurisdiction of the Federal Government over the Cherokees was exclusive, that the Act was in conflict with treaties and acts of Congress, and that the state had no power to pass laws affecting them or their territory. The judgment of conviction was reversed and a mandate issued to the trial court for the release of

[18] 6 Pet. 515, 8 L. Ed. 483 (1832).
[19] *Id.* at 536.

the prisoner. In his opinion the Chief Justice uses these significant words:

> "It is, then, we think, too clear for controversy, that the act of congress, by which this court is constituted, has given it the power, and of course imposed on it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the subjects to be brought before them."[20]

And he concluded:

> "It is the opinion of this court that the judgment of the superior court for the county of Gwinnett, in the state of Georgia, condemning Samuel A. Worcester to hard labour, in the penitentiary of the state of Georgia, for four years, was pronounced by that court under colour of a law which is void, as being repugnant to the constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled."[21]

The aged Chief Justice never rendered nobler service than in this great case. "It was", said Story, "a very able opinion, in his best manner."[22] But Georgia would not submit and President Jackson refrained from enforcing the judgment. The mandate of the Supreme Court was disregarded, Worcester remained in prison, and Georgia had committed an act of nullification. I mention this case not only because of the declarations which it contains of fundamental principles regarding the rights of individuals and the conflict of a state statute with the Constitution, treaties and laws of the United States, but also to emphasize the necessity, in the execution of the powers of our constitutional form of government, that the decrees of a court, to be effective, be enforced by the Executive Department. This failing, or unsupported by public opinion, the judgment of a court in any case is unavailing and of no practical force or effect.

One more constitutional decision of Marshall merits brief consideration, the case of *Barron v. Baltimore,* decided in 1833.[23] In it the court held that the ten amendments to the Constitution were limitations only on Congressional action and did not apply to legislation of the states. In the opinion he says:

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[20] *Id.* at 541.
[21] *Id.* at 562.
[22] 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922) 216.
[23] 7 Pet. (U. S.) 243, 8 L. Ed. 672 (1833).

> "These amendments demanded security against the apprehended encroachments of the general government — not against those of the local governments."[24]

And again:

> ". . . . the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty".[25]

It is significant that in this opinion, one of the last delivered by Marshall involving a constitutional question, he fixed limitations upon the scope of the Constitution, the undue extension of which he had so long and so violently been charged with having endeavored to accomplish.

In those memorable decisions, rendered by Marshall, we find his great and priceless contributions to our constitutional system.

Of Marshall himself what more can I say? He has truly been called the expounder of the Constitution and the father of constitutional interpretation. He was more than either of these; he was the master builder of the superstructure of our constitutional form of government. In the words of Story, his associate, friend and admirer, he was the growth of a century, such a man as is found only when our need is greatest. He made the Constitution a living, vital force in the life of the nation and a firm, indissoluble bond of union and of strength. His fame will live as long as the Republic endures. The respect and the admiration of the lawyers of America, now and hereafter, and the affection and the gratitude of the people of an enduring nation constitute his just and richly merited reward.

From the labors of Marshall what essential elements or features of our constitutional system emerge? To me it seems that these clearly stand forth: the guaranty of individual rights; the system of dual sovereignty; the tripartite division of the powers of sovereignty among the legislative, executive and judicial branches of the government; and, as necessarily incident to the maintenance of this division of powers, the system of checks and balances. These are the essentials of the Constitution, ex-

[24] *Id.* at 250.
[25] *Ibid.*

tending through its entire range and scope and necessary to its operation and effect. Without any one of these fundamentals it can not endure.

To apply and preserve these principles, both in the nation and in each of its states, the courts were created, and on the courts alone rests this solemn and essential duty. Those who formed our Constitutions, in the nation and in the states, intended that the courts should maintain the balance between the nation and the states, enforce and uphold the system of checks and balances, the restraints of the legislature upon the executive, of the executive upon the legislature, of the courts upon both, and through the powers of legislation and appointment, of both upon the courts, and protect the individual against the encroachments of the legislature and the executive alike. This it was intended that the courts should do. This they have done. And because they have performed this duty, our nation and our state have secured to their citizens the right to life, liberty and the pursuit of happiness.

What more can be said of our courts? We hear of charges of usurpation of power by the courts, of judicial tyranny, and of the dictatorship of judges. How unfounded these charges; how at variance with the truth; and how utterly absurd and unworthy of notice except that they are numerous and emanate, in some instances, from persons who occupy positions of influence and authority.

To any one who has even the slightest understanding of the exercise of the judicial function under our constitutional form of government, the utter impossibility of the usurpation of power by the courts or the creation of a judicial dictatorship must be obvious. Against the march of such a movement the first insurmountable barriers are the powers, in the other departments of the government, of legislation and appointment; the second, the lack of the power of initiative in the judicial branch. Courts can only decide cases brought before them in the manner provided by law; and in any case they can only perform the negative function of ascertaining and declaring existing law. The judiciary wields no military power and holds no key to the treasury. The one belongs solely to the executive, and the other solely to the legislature. And even the judgment of the court can be enforced only by the agency of the other coordinate branches of the government. Over and above all this, when the body of the people decides that it no longer needs the judiciary, or becomes dissatisfied with the manner

in which it performs its constitutional duties, it can, and doubtless will, by constitutional amendment, substantially limit its functions or even abolish it. But if and when this happens, our constitutional structure will lie in ruins, for in the words of Webster: "The judicial power is the protecting power of the whole government and its citizens, and its position is upon its outer walls."[26]

If, however, the courts are to continue to discharge properly their constitutional duties and to retain the confidence of the people, the independence of the judiciary, a goal for which Marshall ever strove, must be maintained and preserved. To accomplish this neccessary end, the method of selection, the tenure, and the compensation must be kept in mind. As to the method of selection, I advocate no particular plan. Able and honest judges have been selected in different jurisdictions by appointment of the executive, as in the Federal system and in Massachusetts, by appointment of the legislature, as in Virginia, and by popular election, as in our own state. But I do insist that it is the solemn duty of the people of our nation and of our several states to develop and establish a method or methods which, as far as is humanly possible, will insure the selection for judicial service of lawyers who are honest and able to exercise the true judicial function and who will not be deterred in the performance of their duty by popular prejudices or the influence of groups, and who will not be moved by the pressure or the power of other coordinate branches of the government, with a tenure during good behavior or of long duration subject to termination for cause, and at a salary that will make it practically possible to obtain those who possess these necessary qualifications.

Let us recognize our responsibilities as members of our ancient and honorable profession. Upon us as lawyers, above all others, rests the imperative duty to create in the minds of the people loyalty to our constitutions and respect for the decisions of our courts. May we have the aid and guidance of Divine Providence to enable us to perform this duty, both as lawyers and as citizens of America, to the end that our great Republic, under the Constitution, may endure forever, and that we and our posterity may enjoy to the fullest extent the blessings of liberty under law.

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[26] *Cf.* "The judicial power comes home to every man . . . It touches every private right, every private interest, and almost every private feeling." WHIPPLE, WEBSTER'S GREAT SPEECHES (1897) 316.